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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNILIN BEHEER B.V., *et al.* Plaintiffs, v. TROPICAL FLOORING, *et al.* Defendants.	Case No.: 2:14-cv-02209-BRO(SSx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT** Date: June 16, 2014 Time: 1:30 P.M. Place: Courtroom 14 Judge: Hon. Beverly Reid O'Connell

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I. INTRODUCTION

Plaintiffs Unilin Beheer B.V and Flooring Industries, Ltd. Sarl ("Unilin") brought this action for patent infringement against a multitude of Defendants. The Complaint broadly alleges that the Defendants have sold "products and services" that infringe three different patents. Dkt. No. 1 at ¶¶ 5, 7 and 9. Defendants Floorindo, Inc. dba Tropical Flooring, Maximus Flooring, Fantastic Flooring, Popular Flooring, KC Industries Co., Christina & Son, Inc., and the individuals, Teguh Salim, Toupan Salim, Bobby Lin, aka Bobby Lim, aka Guntar Salim, Yun Fang Zhang aka Christina Zhang (collectively "Floorindo"), move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that it fails to state a claim upon which relief can be granted. The Unilin Complaint does not meet the basic pleading standards required by the Federal Rules. Unilin does not state sufficient facts to establish patent infringement in accord with the Supreme Court's rulings in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 622, 173 L.Ed.2d 868, 129 S.Ct. 1937 (2009). The Complaint also fails to comply with Federal Rule of Civil Procedure 8 as according to the pleading standards enumerated by the Supreme Court. The Complaint contains only summary legal conclusions which are not sufficient to meet the pleading requirements mandated by Supreme Court precedent.

II. LEGAL STANDARDS

A. Pleadings Must Contain Sufficient Factual Allegations, and Not Mere Recitations of Legal Conclusions.

Federal Rule of Civil Procedure 8 provides that to state a claim, a pleading must contain, among other things, "a short and plaint statement of the claim showing that the pleader is entitled to relief." The Supreme Court has clarified that Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *See Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. 544, 555 (2007)). The Court further held that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 664. The Court is thus not bound to accept as true a legal conclusion couched as a factual allegation. *See id.* at 678-79 (Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). As such, a "pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do. Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 698. In *Iqbal*, the Supreme Court further affirmed *Twombly* and held that the pleading standard applied to "all civil actions." *Id.* at 684.

A motion to dismiss for failure to state a claim upon which relief can be granted is a purely procedural question not pertaining to patent law. Thus the law of the regional circuit is applicable. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355-56 (Fed. Cir. 2007); *C & F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000). The court need not accept as true the conclusory allegations, legal characterizations, unreasonable inferences or unwarranted deductions of fact alleged in the operative pleading when deciding a Rule 12(b)(6) motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (legal conclusions need not be taken as true merely because they are cast in the form of factual allegations). "[C]onclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998). Dismissal under Rule 12(b)(6) is appropriate where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

B. The *Twombly/Iqbal* Standard Applies to Patent Cases

Other courts have applied the Supreme Court's pleading standard to patent cases. The Federal Circuit used the *Twombly/Iqbal* analysis in *Colida v. Nokia. Inc.*, 2009 U.S. App. LEXIS 21909 (Fed. Cir. 2009), to affirm the district court's dismissal of a complaint for patent infringement. The plaintiff's amended complaint in *Colida* merely stated that the defendant "reproduces the novel distinctive design appearance of the claim shell design." *Id.* at *2. The Federal Circuit found that such a bare assertion "does not explain which patents include this design, where it appears in the accused product or any other facts relevant to the question of infringement." *See id.* The Federal Circuit recently used the *Iqbal/Twombly* framework in analyzing claims for indirect patent infringement. *R+L Carriers, Inc. v. DriverTech LLC (In re Bill of Lading Transmission & Processing System Patent Litigation)*, 681 F.3d 1323 (Fed. Cir. 2012).

C. Unilin's Complaint Does Not Meet the Minimum Pleading Requirements, and Should Therefore be Dismissed.

The Complaint alleges that all of the Defendants have infringed three different patents owned by Unilin. There are allegations that the Defendants have infringed the patents directly, and by the doctrines of contributory infringement and inducement to infringe (i.e., indirect infringement). Unilin does not state any other causes of action other than patent infringement. All of Unilin's allegations are insufficient to meet the pleading standards required by the Federal Rules of Civil Procedure. The Complaint should therefore be dismissed.

1. Unilin Fails to Properly State a Claim for Direct Patent Infringement.

Unilin's complaint fails to meet the pleading standards for alleging that Floorindo has directly infringed the patents-in-suit. Unilin does not identify a single product that Floorindo has made, used or sold to support a claim of direct patent infringement. Unilin indicates only that the Defendants have infringed each patent by importing, using, selling and/or offering for sale… *products* capable of providing features claimed…" Dkt. No. 1 at ¶¶ 36, 47, 58 (emphasis added). The references in these paragraphs to the "accused products and services" fail to meet the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure which "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *See Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. 544, 555 (2007)). Many courts have found that simply alleging that a defendant's "products" infringe a patent is insufficient to survive a motion to dismiss. *See, e.g., Acco Brands USA LLC v. Hewlett Packard Co.*, 2011 U.S. Dist. LEXIS 67420, at *6 (N.D. Cal. Jun. 23, 2011) ("Moving Defendants sell, manufacture and use a multiplicity of 'products.' Without any sort of factual specificity in the Complaint, Moving Defendants have no notice of the claims they are required to meet and defend. Even prior to the Supreme Court's decision in *Twombly*, the need to provide such notice lay at heart of Fed. R. Civ. P. 8(a).") (internal citation omitted); *see also, Winstron Corp. v. Phillip M. Adams & Assocs., LLC*, 2011 U.S. Dist. LEXIS 102237, at *11 (N.D. Cal. Sept 12, 2011) (stating that "bare reference to 'products' is clearly inadequate"). Further, a patent holder must allege with specificity what the defendants' accused products are and how they infringe upon each patent-in-suit. *Cal. Inst. of Computer Assisted Surgery, Inc. v. Med-Surgical Servs.*, 2010 U.S. Dist. LEXIS 80599, at *4 (N.D. Cal. Aug. 3, 2010) (motion to dismiss granted because the complaint failed to specifically identify an accused product and how that product allegedly infringed); *see also Hewlett-Packard Co. c. Intergraph Corp.*, 2003 U.S. Dist. LEXIS 26093 (N.D. Cal. Sept. 6, 2003) (dismissing plaintiff's complaint that defendant's "software and hardware products" infringed the patent stating the allegations did not provide defendant with "fair notice" as to what claims to defend).

Unilin's failure to identify a single infringing product is inexcusable given that there are many different products Floorindo seoos that might provide the basis for Unilin's allegations of infringement. Unilin also provides no information whether, for example, all defendants are accused of selling the same product and providing the same service, or whether any of the defendants are selling some accused product not sold by its co-defendants and/or providing some infringing service not provided by its co-

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defendants and vice-versa. Unilin's Complaint is inadequate to satisfy the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal*.

The Parties conducted a meet and confer session before Floorindo filed the present motion. Wang Decl., ¶ 2. Counsel for Unilin asserted that the Complaint was sufficient because it complies with Form 18 of the Appendix of Forms to the Federal Rules of Civil Procedure. Floorindo recognizes that a Complaint that comports with Form 18 is sufficient to survive a motion to dismiss. *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277 (Fed. Cir. 2013). Unilin's Complaint, however, does not even satisfy the bare bones requirements of Form 18. Form 18 requires a patent owner to identify what types of products a defendant is selling that allegedly infringe the patent. Form 18 uses an example of an alleged infringer selling "electric motors." The Complaint in this case does not even meet this basic requirement. Unilin does not identify or specify the type of products that allegedly infringe its patents.

Unilin's argument concerning Form 18 is also incorrect with regard to the allegation that Floorindo has provided services that infringe the patents. *See*, Dkt. No. 1 at ¶¶ 36, 47, and 58. *Prism Techs., LLC v. AT&T Mobility, LLC*, 2012 U.S. Dist. LEXIS 126630 (D. Neb. Sept. 6, 2012), considered a situation that involved allegations of direct patent infringement based on services offered by the defendant. The plaintiff's complaint "accuse[d] AT&T's 'various wireless products and data services' of infringement." *Id*. at *11. The Prism court noted that "[t]his allegation is so vague that it encompasses essentially AT&T's entire business, leaving AT&T with no notice as to how it allegedly infringes." *Id*. at *12. The Court agreed "that Prism's accusation is too broad, such that it does not satisfy Form 18 standards." *Id*. The court granted AT&T's motion to dismiss.

Unilin's allegations in the present case are no better than the plaintiff's in *Prism*. Unilin does not describe the nature of the services that are being provided by Floorindo. As a result, Floorindo is left to guess what, if any, of its services infringe the patent claims. The Complaint alleges that Floorindo has infringed the claims of three different patents. Two of them – Patent Nos. 6,874,292 and 6,928,779 – contain only product (as opposed to method) claims. Nonetheless, Unilin's complaint alleges that Floorindo has provided services that infringe the claims of the '292 and '779 Patents. Dkt. No. 1 at ¶¶ 36, 40, 41, 47, 51, and 52. It is difficult to understand how a service offered by a defendant can infringe a product claim. Unilin's pleading does not provide any factual allegations that would support such a claim.

All claims for direct infringement in Unilin's complaint should be dismissed.

2. Unilin Fails to Properly State a Claim for Indirect Patent Infringement.

Unilin's indirect infringement allegations are also fatally deficient. To establish inducement, a patent owner must plead and prove that: (1) the conduct being induced constitutes direct infringement; and (2) the defendant inducing the infringement "actively and knowingly" aided a third party's direct infringement. *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc). Contributory infringement also requires that a patent owner show that the accused indirect infringer "knew that the combination for which [their] components were especially made was both patented and infringing and that [their] components have no substantial non-infringing uses." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1320 (Fed. Cir. 2009) (internal quotations omitted).

The Federal Circuit recently held in the case of *R+L Carriers* that Form 18 is not applicable when a plaintiff alleges indirect infringement. 681 F.3d 1323 (Fed. Cir. 2012). "Form 18 should be strictly construed as measuring only the sufficiency of allegations of direct infringement, and not indirect infringement." *Id*. at 1336. The court in *AntiCancer Inc. v. Xenogen Corp.*, opined that a complaint for patent infringement must plead facts "beyond a bare statement of direct and indirect infringement" under the standard set forth in *Iqbal* and *Twombly*. 248 F.R.D. 278, 282 (S.D. Cal. 2007). Merely reciting the bare elements of indirect infringement under 35

U.S.C. § 271 is insufficient. *Id.* at 282; *Enlink Feoenergy Servs., Inc. v. Jackson & Sons Drilling & Pump, Inc.*, 2010 U.S. Dist. LEXIS 37859 (N.D. Cal. Mar. 24, 2010) (patentee's claim of direct infringement and inducement of infringement dismissed for failure to allege more than "threadbare recitals of the elements of a cause of action") (citation omitted).

Unilin has failed make the necessary allegations for their indirect infringement claims, for the reasons discussed below.

a. *Unilin Failed to Allege Knowledge Required to Establish Indirect Infringement.*

Unilin alleges both contributory patent infringement and active inducement of patent infringement. Both contributory and active inducement infringement require that defendants' conduct of inducing or contributing occur after the defendants knew of (1) the patent-in-suit and (2) that the direct-infringers' acts constitute patent infringement. *See Global-Tech Applicances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011) (defining the "knowing" requirement in inducing infringement); *see also, Aro Mgf. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964) (defining the "knowing" requirement in contributory infringement). Unilin only alleges that notice of the patents-in-suit was provided to defendants Tropical Flooring and Maximus Flooring prior to filing the Complaint. Dkt. No. 1 ¶¶ 37, 38, 48, 49, 59, and 60. Further, the only support establishing the knowledge element required for the rest of the defendants is the Complaint itself. Unilin cannot hold any of the defendants liable for inducing or contributing to another's direct infringement before the defendants had knowledge. *See, e.g., Cybiotronics, Ltd. v. Golden Source Electronics Ltd.*, 130 F.Supp.2d 1152, 1165-66 (C.D. Cal. 2001) (inducement and contributory infringement claims dismissed where there was no evidence that the accused infringer knew of the patent prior to the lawsuit); *see also, Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.*, 2012 U.S. Dist. LEXIS 51650 (N.D. Cal. Mar. 22, 2012) (motion to dismiss indirect infringement claim granted because plaintiff did not allege facts sufficient to suggest that defendants had knowledge of the patent prior to the filing of the complaint); *Fujitsu Ltd. v. Belkin Int'l, Inc.*, 782 F.Supp.2d 868, 892 (N.D. Cal. 2011) (motion to dismiss inducement claim granted because the complaint "only alleged in conclusory terms that the defendants have received notice of the patents"). Unilin's failure to plead actual knowledge of direct-infringers cannot be remedied and the indirect infringement claims should be dismissed.

b. *Unilin Fails to Allege Specific Intent to Induce Infringement.*

A patentee asserting inducement to infringe must plead facts establishing that "the alleged inducer knew of patent, knowingly induced the infringing acts, and possessed a specific intent to encourage another's infringement of the patent." *Vita-Mix Corp. v. Basic holding, Inc.*, 581 F.3d 1317, 1328 (Fed Cir. 2009); *see also Global-Tech*, 131 S. Ct. 2060, 2068 (2011) ("we now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement"). A patent holder must allege facts beyond the accused inducer's mere knowledge of the alleged acts of infringement. *Id.* Unilin's failure to allege facts establishing that Floorindo had actual knowledge of the patent and also had the specific intent to induce infringement of a third party infringer requires dismissal of these claims. *See, e.g., In re Bill of Lading Transmission and Processing Sys. Patent Lit*, 695 F.Supp.2d 680, 684-85 (S.D. Ohio 2010) (infringement claim dismissed where plaintiff failed to allege sufficient facts making it plausible that defendants specifically intended to induce others to infringe plaintiff's patent); *Halton, Co. v. Strivor, Inc.*, 2010 U.S. Dist. LEXIS 50649 (N.D. Cal. May 21, 2010) (same).

Unilin simply alleges that "Defendants have induced and continue to induce others to infringe… with specific intent… by advertising and selling the products and by providing written instructions instructing customers on how to assemble and use the products." Dkt. No. 1 at ¶¶ 41, 52, and 62. The Supreme Court has held that these types of conclusory legal statements are not sufficient, as noted above. Unilin does not plead any *facts* that would give raise to a plausible claim for induced infringement. Without at least some facts identifying the product or products that allegedly infringe, and an explanation of how the Defendants induced others, Floorindo cannot possibly discern how its alleged conduct establishes a specific intent to induce infringement.

c. *Unilin Fails to Plead Facts That Support a Claim for Contributory Patent Infringement.*

A plaintiff alleging a claim for contributory infringement under 35 U.S.C. § 271(c) must plead that (1) the defendant sold a component or material for use in practicing the patented method; (2) the component or material constitutes a material part of the invention; (3) the defendant knew that the item it sold was especially made or adapted for use in infringing the patented method; and (4) the item sold is not a staple article or commodity of commerce suitable for substantial non-infringing uses. *See Sandisk Corp. v. Lexar Media, Inc.*, 91 F. Supp. 2d. 1327, 1331 (N.D. Cal. 2000). Unilin does not plead facts sufficient to support elements of the cause of action.

Unilin does not allege that the "products" make up a part or are a component of the invention. If the flooring products at issue are the invention itself or contain the invention, they are themselves the accused products, not a component of the accused product under § 271(c). If the flooring products at issue are a component of the accused product, Unilin must allege facts that will put Floorindo on notice of the claim in a way that can be understood – and must meet the requirements of showing that the component is a material part of the invention, that the defendants knew that the component was especially made for use in infringement, and that the component does not have substantial non-infringing uses. Having failed these, Unilin fails to sufficiently plead a claim of § 271(c) contributory infringement.

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D. Unilin Has Failed to Allege Facts that Support a Claim for Willful Patent Infringement.

Unilin has alleged (in bare conclusory fashion) that Floorindo has willfully infringed the patents in suit. Dkt. 1 at ¶¶ 43, 54 and 64. A patentee asserting willful patent infringement must "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In Re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). A patentee must also demonstrate that "this objectively-defined risk . . . was either known or so obvious it should have been known to the accused infringer." *Id*.

Unilin does not allege the facts necessary to support t the elements for willfulness articulated in *Seagate*. Unilin merely alleges that it provided the "Defendants" with "notice of infringement of [the patents in suit]." *See, e.g.*, Dkt. No. 1 at ¶ 54. However, Unilin does not identify which, if any, of the Defendants received actual notice. Unilin alleges elsewhere in the Complaint that it only provided actual notice of the patents to some of the Defendants, but not all of them. *See* discussion above at 7:18-20. Unilin then asserts that "on information and belief, Defendants' infringement has been and continues to be willful." *Id*. Unilin does not state any facts to support these allegations, as is required by the Supreme Court. All Unilin does is recite summary legal conclusions. This is not sufficient to comply with the requirements of *Iqbal* and *Twombly*.

Even if Unilin's conclusory allegations are considered to be facts (and they are not), the allegations are not sufficient to plead a case for willful patent infringement under the dictates of *Seagate*. Unilin does not allege that the Defendants acted despite the objectively high likelihood that its actions constituted infringement of a valid patent. Unilin does not provide any facts that would establish that the actions of the Defendants constituted patent infringement, or that the patents are valid. Unilin also does not provide facts that show that the risk was known to each of the Defendants, or that it was so obvious that it should have been known to them.

The Court should dismiss all of Unilin's allegations of willful infringement.

E. Unilin Should Not be Granted Leave to Amend.

Federal Rule of Civil Procedure 8 mandates that where a complaint is so confusing that its "'true substance, if any, is well disguised' may be dismissed sua sponte for failure to satisfy Rule 8." *Hearns v. San Bernardino Police Dep't*, 530 F. 3d 1124, 1131 (9th Cir. 2008) (quoting *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cit. 1969); *see also*, *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) ("Something labeled a complaint but… prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint").

The 9th Circuit in *McHenry* further clarifies that Rule 8(a) is grounds for dismissal independent of Rule 12(b)(6), and that dismissal on Rule 8(a) grounds do not require that the complaint be wholly without merit. 84 F.3d 1172, 1179; *see also*, *Gottschalk v. City & County of San Francisco*, 964 F.Supp.2d 1147, 1154. Further, the 9th Circuit has found that "[a] complaint which fails to comply with [Rule 8] may be dismissed with prejudice[.]"). *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981); *see also*, *Gottschalk*, 964 F.Supp.2d 1147, 1154 ("Failure to comply with Rule 8 may be grounds for dismissal with prejudice under Rule 41(b)"). The *Gottschalk* court also found that though the court "should first look to other less drastic alternative includeing allowing further amended complaints, allowing additional time, or insisting that appellant associate experienced counsel. The court, however, need not exhaust all of these options before dismissing a case." *Id.* at 1155 (citation omitted).

In *Gottschalk*, the plaintiff's complaint was dismissed with prejudice based on several factors. Specifically, the court in *Gottschalk* found that (1) plaintiff's complaint contained factual allegations that are "choppy" and "grammatically irregular"; (2) plaintiff's complaint failed to identify "which claims are brought against which Defendants, and to articulate specific facts connecting each Defendant with the facts underlying the applicable claims"; (3) plaintiff's complaint "cites a number of legal theories for the same claim" with "no explanation or factual elaboration indicating how [the defendants] did so"; and (4) "most importantly, Plaintiff fails to sufficiently allege the factual basis for her claims." *Id*. at 1155-58. Thus, the court in *Gottschalk* granted defendant's motion to dismiss the complaint with prejudice based on plaintiff's "failure to comply with the requirements of Rule 8(a)." *Id*. at 1159-60.

Like the plaintiff in *Gottschalk*, here, Unilin's Complaint also failed to identify which claims are brought against which defendants, failed to articulate specific facts connecting each defendant with the facts underlying the applicable claims, failed to provide explanation or factual elaboration indicating how each defendant allegedly infringes, and failed to sufficiently allege the factual basis of Unilin's claims. In addition, unlike the plaintiff in *Gottschalk* who provided choppy, confusing, and grammatically incorrect factual allegations, Unilin failed to allege *any* factual allegations sufficient to comply with Rule 8(a). Thus, Floorindo and KC respectfully requests that the court exercise its discretion to dismiss Unilin's Complaint with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the present motion, and dismiss Unilin's Complaint without leave to amend.

Respectfully submitted,

KLEINBERG & LERNER, LLP

Dated: May 16, 2014 By: /S/*Vivian Z. Wang*
Michael Hurey
Vivian Z. Wang

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of 18 years and not a party to this action; and that I served the individuals on the below-service list the following document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Filed May 16, 2014 on the ECF system, served pursuant to General Order No. 550 and/or via email, with:

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Date: May 16, 2014

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